



Avalanche of Recent Export Requirements for China, Russia and Other Countries

03.16.2021

There's been a non-stop bombardment of recent export amendments involving China and other countries of concern within the last six months. The main driver behind these has been the U.S. Government's concern about the Chinese national strategy of "military-civil fusion" using civilian companies to help support Chinese military and intelligence activities. It is believed that U.S. companies that have historically sold products to China's commercial sector may be drawn unwittingly into supporting the Chinese military. While these amendments are principally targeted at China, many also apply to Russia, Venezuela, Hong Kong (now part of China under U.S. export laws), Burma and other countries for similar reasons.

These provide an array of new requirements for U.S. companies that do business with these countries, including additional lists to check, due diligence requirements and licensing obligations. Many apply to more than just exports to other international business transactions including acquisitions, licensing and other financial transactions.

While each of these regulations by itself may have a limited scope, the totality of these actions constitute a comprehensive effort by the U.S. Government to tighten controls on these countries, and we expect more to come. Many companies doing business with these countries are recalibrating their export compliance efforts to address these new requirements. The following is a summary of the most important of these changes.

1. Expansion of the Military End Use/End User Rule. In a previous Client Alert we discussed the amendments to the BIS Military End Use/End User Rule that were adopted in 2020. (See Alert.) Since this issue is connected to many of the amendments discussed below we have referenced it again here. Under the revised EAR §744.21, parties are prohibited from exporting items listed in Supplement No. 2 to EAR Part 744 to China, Russia, Venezuela and Burma if at the time of such transfer the exporter had knowledge that the item is intended entirely or in part for a military end use or military end user in these countries. The term knowledge is defined to include reason to know or reason to believe and can be inferred from an awareness of a high probability of the occurrence of future events.

As part of the amendment, BIS broadened the definition of military end use beyond traditional military items to include any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production of military items.[1] Similarly BIS expanded the definition of the term military end user to include not just traditional military organizations but also any person or entity whose actions or functions are intended to support military end uses as defined in the regulation.[2] Finally, BIS expanded the scope of products, technologies and software that are covered under the regulation.[3]

Thus the amendment significantly expanded the scope of the military end use/end user regulation beyond what one would normally think are military items to now include many commercial items that were not developed for military application. Similarly military end users can now include many commercial companies, universities and research institutions not traditionally associated with the military. The U.S. is targeting not only traditional military organizations but also commercial Chinese companies that have some business relationship with them. BIS has advised U.S. companies to conduct careful due diligence reviews in their export transactions to confirm that parties involved do not fall within the broadened definitions under the amendment. This amendment is important as it serves as the foundation of many of the additional regulations that are discussed below.

2. Adoption of the EAR Military End User List. On December 23, 2020 BIS established a list of parties that BIS has determined are military end users for purposes of the military end use/end user controls in EAR §744.21. This is referred to as the Military End User List (the MEU List)[4] BIS also published the first tranche of names on the list including 57 Chinese companies and 45 Russian companies. (BIS has since added additional names to the list and it is expected that more will be added as required in the future). If a party is on the MEU List, it is treated as a military end user for purposes of the military end use/end user regulations at EAR §744.21. It is important to recognize that this list is *not intended by BIS as an exclusive list of all military end users* other foreign companies can qualify as military end users if they meet the conditions of EAR §744.21, even if they are not on the list. Thus BIS is continuing to urge U.S. companies to conduct careful due diligence in their transactions to identify parties that fit within the definition of military end users in EAR §744.21 even if parties are not on the MEU List.

3. Military-Intelligence End Uses and End Users Significant Expansion of the Military End Use Rule. On January 15, 2021 BIS published an interim final rule imposing export restrictions on exports intended for a military-intelligence end use or a military-intelligence end user in China, Russia, Venezuela and countries listed in Country Groups E:1 or E:2. These requirements became effective on March 16, 2021.

Under this provision, in addition to the license requirements for items specified on the Commerce Control List (CCL), parties are prohibited from exporting, reexporting, or transferring (in-country) any item subject to the EAR without a license from BIS if at the time of the transaction it has knowledge that the item is intended entirely or in part for a military-intelligence end use or a military-intelligence end user in the above countries.[5] The term military-intelligence end use and military-intelligence end user have very broad definitions that could conceivably include many commercial products[6]

In addition, the new amendment prohibits U.S. persons from supporting a military-intelligence end use or a military-intelligence end user in the above countries.[7] This requirement applies to all activities by U.S. persons even if the items involved are not subject to the EAR. The term support is broadly defined to include performing any contract, service, or employment the exporter knows may assist or benefit the above end uses or end users including ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, transporting, freight forwarding, conducting negotiations in furtherance of and otherwise facilitating such activities[8]

This regulation is significant for two reasons. First, unlike the military end use rule set out at EAR §744.21, these restrictions apply to all items subject to the EAR and not just items listed in Supplement No. 2 to Part 744. This is a significant expansion of the scope of these controls. Second, the rule also applies to activities by U.S. persons even if the item involved is not subject to the EAR. There are only a few other provisions of the EAR that apply to the performance of services unrelated to an export, reexport or retransfer transaction, so this is a noteworthy change, and a possible prelude to other future changes in the scope of the EAR. Thus BIS is continuing to expand export restrictions under the EAR from merely items listed on a control list to transactions based solely upon a party's identity and/or if the party is engaged in specific targeted activities, further increasing the complexity and risk under U.S. export requirements.

4. DOD List of Chinese Communist Military Companies and Securities Trading Ban. On November 12, 2020 President Trump issued Executive Order 13959 entitled "Addressing the Threat From Securities Investments That Finance Communist Chinese Military Companies." The order prohibits U.S. persons from engaging in transactions in publicly traded securities of Communist Chinese Military Companies (CCMCs) as defined in Section 4 of the Executive Order[9] The U.S. Department of Defense developed an initial list of 31 state owned and privately owned CCMCs that was included in an Annex to the Executive Order (sometimes referred to as the §1237 List), and DOD has subsequently added companies to the list on a number of occasions. The prohibition is quite broad and includes trading in any public securities of the targeted companies, and securities that are derivatives of or designed to provide investment exposure to such securities and investments in both U.S. and foreign investment funds that own such securities.

Following the issuance of the Executive Order, OFAC took a number of steps to administer the Order including publishing the "Non-SDN Communist Chinese Military Companies List" (which includes "aka" names, names of certain subsidiaries, etc.), issuing a series of FAQs and related interpretative guidance, establishing a process for applying for specific licenses and issuing a number of general licenses. In addition, on January 13, 2021 President Trump issued an amendment to the original Executive Order providing additional details regarding the divestiture process for the covered securities.

5. Commerce Department Review of Acquisitions of Information and Communications Technologies and Services. The Commerce Department has adopted an Interim Final Rule effective March 22, 2021 for the review of transactions by parties subject to U.S. jurisdiction involving information and communications technologies and services ("ICTS") with parties determined to be "foreign adversaries." The regulation was adopted to implement President Trump's May 15, 2019 Executive Order 13873 entitled "Securing the Information and Communications Technology and Services Supply Chain." The rule authorizes the Secretary of Commerce to review, and if required, prohibit, amend or mitigate, transactions involving ICTs between U.S. and foreign parties that pose an "undue or unacceptable risk" to U.S. national security. The term "foreign adversaries" is defined to include: China, Russia, Venezuela, Iran and North Korea, and additional countries can be added in the future. This procedure has been described as a CFIUS-type process for the review of acquisitions of telecom and computer infrastructure by U.S. parties to protect U.S. cybersecurity and broader national security. This is yet another action by the outgoing Trump Administration to limit access to U.S. communications infrastructure produced in China and other countries of concern. The incoming Biden administration is currently reviewing the rule and may accept, amend or nullify it in the coming weeks.

6. Hong Kong. The U.S. has taken a number of significant actions involving Hong Kong in response to China's activities there. As part of this, President Trump issued Executive Order 13936 (entitled "Executive Order on Hong Kong Normalization") and Congress enacted the Hong Kong Autonomy Act of 2020 (the "HKAA").^[10] (For a more detailed discussion of this issue see our previous client alert: The New US Rules for Export Trade with Hong Kong.) Based on these authorities, BIS, OFAC and the State Department have taken a number of actions including: (i) BIS amended the EAR to provide that Hong Kong is now treated as part of China for export control purposes under the EAR; (ii) DDTC issued a policy notice advising that Hong Kong would now be considered part of China under the Arms Export Control Act and ITAR and as such Hong Kong would be considered as part of China as a Section 126.1 "proscribed country"; (iii) OFAC published the Hong Kong-Related Sanctions Regulations at 31 CFR Part 585; and (iv) various parties were designated for sanctions on the OFAC Specially Designated Nationals List (the "SDN List") for Hong Kong-related actions under EO 13936.

7. Ban On Apps by Eight Chinese Software Developers. On January 5, 2021 President Trump issued Executive Order 13971 that prohibits persons subject to U.S. jurisdiction from entering certain transactions with eight Chinese software companies and their subsidiaries as those transactions are identified by the Secretary of Commerce. The eight companies are: Alipay, CamScanner, QQ Wallet, SHAREit, Tencent QQ, VMate, WeChat Pay, and WPS Office, which include well known payment apps. The Executive Order requires the Secretary of Commerce to identify the transactions and persons that develop or control the Chinese connected software applications subject to the order. The order

provided the following rationale for the action:

By accessing personal electronic devices such as smartphones, tablets, and computers, Chinese connected software applications can access and capture vast swaths of information from users, including sensitive personally identifiable information and private information. This data collection threatens to provide the Government of the People's Republic of China (PRC) and the Chinese Communist Party (CCP) with access to Americans' personal and proprietary information which would permit China to track the locations of Federal employees and contractors, and build dossiers of personal information.

This is similar to the ban on certain transactions with WeChat and its parent company Tencent Holdings Ltd. on August 6, 2020 under Executive Order 13943.

8. Designations of Chinese Companies on the Entity List, Unverified List and Specially Designated Nationals List. The U.S. has designated a significant number of Chinese companies on the BIS Entity List, Unverified List and OFAC SDN List (along with entities from Hong Kong, Russia, Burma, UAE, Pakistan, Bulgaria, Malta and other countries) in recent months. This includes designations on January 15, 2021 (Entity List), December 22, 2020 (Entity List), October 9, 2020 (Unverified List), September 22, 2020 (Entity List) and August 27, 2020 (Entity List). In one designation alone on December 22, 2020 BIS listed 77 parties to the Entity List, including well known Chinese semiconductor manufacturers, UAV manufacturer, research institutions and universities. In the Federal Register notice announcing this designation BIS highlighted China's military-civil fusion doctrine and evidence of activities between commercial Chinese companies and China's military industrial complex. Other bases for designations cited included human rights abuses, misappropriation of U.S. trade secrets, land reclamation in the South China Sea and acquisition of U.S. items in support of the People's Liberation Army. Under designations to the Entity List, parties are prohibited from entering into export, reexport and transfer (in country) transactions involving items subject to the EAR if the purchaser, intermediate consignee, ultimate consignee or end user are listed on the list.

9. Continued Pressure On China Under CFIUS. The U.S. continues to scrutinize acquisitions by Chinese companies of U.S. businesses, with particular emphasis on acquisitions in the technology, infrastructure, advanced materials, biotech and other sensitive sectors on a highly aggressive level. According to recent press reports CFIUS, through its recently expanded enforcement division, has been reviewing previously concluded acquisitions of and/or equity investments in U.S. companies by Chinese investors based on threats to U.S. national security for possible orders to unwind or modify such transactions. See: TikTok Was Just the Beginning: Trump Administration Is Stepping Up Scrutiny of Past Chinese Tech Investments and Government Swat Team Is Reviewing Past Startup Deals Tied To Chinese Investors. Examples of forced divestitures include the acquisition of the U.S. hotel software company StayNTouch by Chinese purchasers and the order by President Trump that Chinese company ByteDance divest its ownership of social media company TikTok.

10. Amendment of National Security License Review Policy For China, Russia and Venezuela. October 29, 2020 BIS amended the license review policy for items that are controlled for national security (NS) reasons when destined to China, Venezuela or Russia. Under the revised policy, BIS and

the other reviewing agencies will assess whether the proposed transaction will make a "material contribution to the weapons systems capability" of those countries. As part of such assessment license applications will be reviewed to determine the risk of diversion to a military end user or military end use. The new regulation also provides a list of factors that BIS will review in making such determinations - the following factors are among those that will be considered in such review:

- (a) The appropriateness of the export, reexport, or transfer for the stated end use;
- (b) The significance of the item for the weapons systems capabilities of the importing country;
- (c) Whether any party is a "military end user" as defined in § 744.21(g) of the EAR;
- (d) The reliability of the parties to the transaction, including whether: (1) An export or reexport license application has previously been denied; (2) Any parties are or have been engaged in unlawful procurement or diversion activities; (3) The parties are capable of securely handling and storing the items; and (4) End-use checks have been and may be conducted by BIS or another U.S. government agency on parties to the transaction;
- (e) The involvement of any party to the transaction in military activities, including activities involving the "development," "production," maintenance, repair, or operation of weapons systems, subsystems, and assemblies;
- (f) Government strategies and policies that support the diversion of exports from their stated civil end use and redirection towards military end use; and
- (g) The scope and effectiveness of the export control system in the importing country.

This is yet another incremental step by the U.S. Government to focus on the overlap of military and commercial activities in these countries under U.S. export control policy.

11. Additional Russian Sanctions. On March 2, 2021 OFAC, BIS and the State Department announced another coordinated round of sanctions against Russia. The latest actions were in response to the poisoning of Russian opposition leader Alexey Navalny. As part of this: (i) OFAC designated seven Russian officials on the SDN List; (ii) BIS designated fourteen parties to the Entity List located in Russia, Germany and Switzerland; (iii) DDTC announced that it was adding Russia to the list of countries in ITAR §126.1 that are subject to a policy of denial (the "Section 126.1 Proscribed Countries"); and (iv) State announced that it was taking a number of actions including adding six Russian entities to the CAATSA Section 231 List of Specified Persons and expanding sanctions under the U.S. Chemical and Biological Weapons Control and Warfare Elimination Act.

12. Response From China. China has continued to respond to the above amendments in a proportionate fashion, including by enacting an enhanced Chinese export control law^[11] and adopting new "blocking" rules to counteract the extraterritorial application of U.S. and other foreign laws deemed to be objectionable by the Chinese Government.^[12] Other actions may be forthcoming based

upon the outcome of discussions with the new Biden administration.

The increase in the U.S. adversarial posture against China started in the Obama administration, expanded during the Trump administration and we expect will continue through the Biden administration, although the details of the new Biden policies will be unfolding in the coming months. Notwithstanding, we expect this frigid climate between the U.S. and China (as well as Russia and the other countries of concern?) will continue for the foreseeable future. Companies should brace themselves for additional turbulence in dealing with these countries.

Related Articles:

- OFAC Sanctions Laws: Requirements for U.S. Companies
- U.S. Sanctions Laws: Dangers Ahead for Foreign Companies
- Dealing With Violations In Export and Import Transactions
- ITAR For Government Contractors
- ITAR Compliance Checklist

[1] The term "Military End Use" is defined in EAR §744.21(f) as follows: "In this section, "military end use" means: incorporation into a military item described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations); incorporation into items classified under ECCNs ending in "A018" or under "600 series" ECCNs; or any item that supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, "development," or "production," of military items described on the USML, or items classified under ECCNs ending in "A018" or under "600 series" ECCNs."

[2] The term "military end user" is defined in EAR §744.21(g) as follows: In this section, the term "military end user" means the national armed services (army, navy, marine, air force, or coast guard), as well as the national guard and national police, government intelligence or reconnaissance organizations, or any person or entity whose actions or functions are intended to support "military end uses" as defined in paragraph (f) of this section.

[3] The amendment adds many items from the following ECCNs to Supplement No. 2 to part 744 to be covered under the regulation: 2A290, 2A291, 2B999, 2D290, 3A991, 3A992, 3A999, 3B991, 3B992, 3C992, 3D991, 5B991, 5A992, 5D992, 6A991, 6A996, and 9B990. Additionally, the amendment expands the range of items under ECCNs 3A992, 8A992, and 9A991 which were already included in Supplement No. 2. These include items in the materials

processing, electronics, telecommunications, information security, marine and acoustic, aircraft, sensor and laser and propulsion fields. Many of the new ECCN entries are in the high digits (eg., XX991, 992, 999) which designate items with a relatively low level of export control, thus expanding the range of items covered under the regulation to many low levels of products, software and technologies.

[4] See Supplement No. 7 to EAR Part 744.

[5] See EAR § 744.22.

[6] The definition of "military-intelligence end use" is set forth at EAR sec. 744.22(f)(1) as follows: "Military-intelligence end use" means the design, development, production, use, operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of, or incorporation into, items described on the U.S. Munitions List (USML) (22 CFR part 121, International Traffic in Arms Regulations), or classified under ECCNs ending in "A018" or under "600 series" ECCNs, which are intended to support the actions or functions of a "military-intelligence end user," as defined in this section.

The definition of "military-intelligence end user" is set forth at EAR sec. 744.22(f)(2) in part as follows: "Military-intelligence end user" means any intelligence or reconnaissance organization of the armed services (army, navy, marine, air force, or coast guard); or national guard

[7] See EAR §744.6(b).

[8] EAR §736.2(b)(7)(i)(A) provides in pertinent part: If you are a "U.S. person," as that term is defined in § 772.1 of the EAR, you may not engage in any activities prohibited by § 744.6(b) or (c) of the EAR, which prohibit, without a license from BIS, the shipment, transmission, or transfer (in-country) of items not subject to the EAR; facilitating such shipment, transmission, or transfer (in-country); or the performance of any contract, service, or employment (including, but not limited to: ordering, buying, removing, concealing, storing, using, selling, loaning, disposing, servicing, financing, or transporting, freight forwarding, or conducting negotiations in furtherance of) that you know or are informed by BIS will support: (5) A "military-intelligence end use" or a "military-intelligence end user," as defined in § 744.22(f) of the EAR, in the People's Republic of China, Russia, or Venezuela; or a country listed in Country Groups E:1 or E:2.

[9] Certain sales of securities of Chinese Communist Military Companies made during a prescribed time period solely to divest of such securities are permitted under Sections 1(b) and 1(c) of the Executive Order, as amended.

[10] Pub. L. 116-149.

[11]

See Standing Committee of the National People's Congress, Export Control Law of the People's Republic of China, October 17, 2020.
[12] On January 9, 2021 China's Ministry of Commerce (MOFCOM) issued Order No. 1 of 2021 ? Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures.

Related People

- Thomas B. McVey ? 202.293.8118 ? tmcvey@williamsmullen.com
- Christopher H. Skinner ? 202.293.8129 ? cskinner@williamsmullen.com

Related Services

- International Trade and Business